NO. 47487-5-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

CHARLENE ALLEN,

Appellant.

SUPPLEMENTAL BRIEF OF APPELLANT

John A. Hays, No. 16654
Attorney for Appellant

1402 Broadway
Suite 103
Longview, WA 98632
(360) 423-3084

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

State Cases

Statutes and Court Rules

ASSIGNMENT OF ERROR

Assignment of Error

This court should not impose appellate costs on appeal.

Issues Pertaining to Assignment of Error

Should an appellate court impose costs on appeal if an indigent client has no present or future ability to pay those costs?

STATEMENT OF THE CASE

In this case the state charged the defendant with possession of methamphetamine, possession of heroin, and third degree theft. CP 53-55. The court then found the defendant indigent and appointed an attorney to represent her "[w]holly at public expense." CP 51. At sentencing, the defense objected to the imposition of discretionary legal financial obligation on the basis that the defendant did not have the present or future capacity to pay. CP 20-21. When determining whether or not to impose discretionary legal financial obligations the court asked the defendant if she had "[a]ny special skills." RP 22. The defendant responded "just being a mom." *Id.* When asked what type of employment she had in the past, the defendant responded: "Um, just like random stuff. I've done waitressing (sic), care giving – well, I can't do care giving anymore." *Id.*

In addition, at sentencing the court ordered the defendant to undergo a chemical dependency evaluation and successfully complete the treatment recommended. CP 20. This was based upon the defendant's admitted drug use and her conviction for possession of methamphetamine. *Id.* The court then entered an order of indigency in this case upon its finding that "the defendant lacks sufficient funds to prosecute an appeal . . ." CP 7. Appellant now argues this court should exercise its discretion and not order costs on appeal should the state substantially prevail.

ARGUMENT

THIS COURT SHOULD NOT IMPOSE APPELLATE COSTS ON APPEAL.

The appellate courts of this state have discretion to refrain from awarding appellate costs even if the State substantially prevails on appeal. RCW 10.73.160(1); *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); *State v. Sinclair*, 192 Wn. App. 380, 382, 367 P.3d 612, 613 (2016). A defendant's inability to pay appellate costs is an important consideration to take into account when deciding whether or not to impose costs on appeal. *State v. Sinclair, supra.* In the case at bar the trial court found Ms Allen indigent and entitled to the appointment of counsel at both the trial and appellate level. CP 3, 165-166. In the same matter this Court should exercise its discretion and disallow trial and appellate costs should the State substantially prevail.

Under RAP 14.2 the State may request that the court order the defendant to pay appellate costs if the state substantially prevails. This rule states that a "commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review." RAP 14.2. In *State v. Nolan, supra*, the Washington Supreme Court held that while this rule does not grant court clerks or commissioners the discretion to decline the

imposition of appellate costs, it does grant this discretion to the appellate court itself. The Supreme Court noted:

> Once it is determined the State is the substantially prevailing party, RAP 14.2 affords the appellate court latitude in determining if costs should be allowed; use of the word "will" in the first sentence appears to remove any discretion from the operation of RAP 14.2 with respect to the commissioner or clerk, but that rule allows for the appellate court to direct otherwise in its decision.

State v. Nolan, 141 Wn. 2d at 626.

Likewise, in RCW 10.73.160 the Washington Legislature has also granted the appellate courts discretion to refrain from granting an award of appellate costs. Subsection one of this statute states: "[t]he court of appeals, supreme court, and superior courts ***may*** require an adult offender convicted of an offense to pay appellate costs." (emphasis added). In *State v. Sinclair*, *supra*, this Court recently affirmed that the statute provides the appellate court the authority to deny appellate costs in appropriate cases. *State v. Sinclair*, 192 Wn. App. at 388. A defendant should not be forced to seek a remission hearing in the trial court, as the availability of such a hearing "cannot displace the court's obligation to exercise discretion when properly requested to do so." *Supra.*

Moreover, the issue of costs should be decided at the appellate court level rather than remanding to the trial court to make an individualized finding regarding the defendant's ability to pay, as remand to the trial court

not only "delegate[s] the issue of appellate costs away from the court that is assigned to exercise discretion, it would also potentially be expensive and time-consuming for courts and parties." *State v. Sinclair*, 192 Wn. App. at 388. Thus, "it is appropriate for [an appellate court] to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellate brief." *State v. Sinclair,* 192 Wn. App. at 390. In addition, under RAP 14.2, the Court may exercise its discretion in a decision terminating review. *Id.*

An appellate court should deny an award of costs to the state in a criminal case if the defendant is indigent and lacks the ability to pay. *Sinclair, supra.* The imposition of costs against indigent defendants raises problems that are well documented, such as increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration. *State v. Sinclair*, 192 Wn.App. at 391 (citing *State v. Blazina*, *supra*). As the court notes in *Sinclair*, "[i]t is entirely appropriate for an appellate court to be mindful of these concerns." *State v. Sinclair*, 192 Wn.App. at 391.

In *Sinclair*, the trial court entered an order authorizing the defendant to appeal *in forma pauperis,* to have appointment of counsel, and to have the preparation of the necessary record, all at State expense upon its findings that the defendant was "unable by reason of poverty to pay for any of the expenses

of appellate review" and that the defendant "cannot contribute anything toward the costs of appellate review." *State v. Sinclair*, 192 Wn. App. at 392. Given the defendant's indigency, combined with his advanced age and lengthy prison sentence, there was no realistic possibility he would be able to pay appellate costs. Accordingly, the Court ordered that appellate costs not be awarded.

Similarly in the case at bar, the defendant is indigent and lacks an ability to pay. First, the trial court found the defendant indigent and unable to pay the costs of either the trial or the appeal. Second, when determining whether or not to impose discretionary legal financial obligations the court asked the defendant if she had "[a]ny special skills." RP 22. The defendant responded "just being a mom." *Id.* 23. When asked what type of employment she had in the past, the defendant responded: "Um, just like random stuff. I've done waitressing (sic), care giving – well, I can't do care giving anymore." *Id.*

What the facts reveal in this case is that the defendant is an uneducated, single mother of more than one child who, at best, has worked a minimum wage job that required no special training or education. She is drug addicted and in need of treatment. Given these factors, it is unrealistic to think the defendant will be able to pay appellate costs. Thus, this court should exercise its discretion and order no costs on appeal should the state

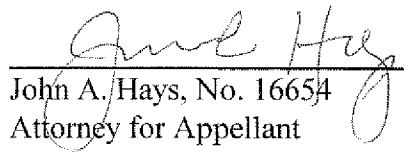
substantially prevail.

CONCLUSION

If the state prevails, this court should not impose costs on appeal.

DATED this 7th day of May, 2016.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON, **Respondent,** **vs.** **CHARLENE ALLEN,** **Appellant.**	**NO. 47487-5-II** **AFFIRMATION OF SERVICE**

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Mr. Jesse Espinoza
   Clallam County Prosecuting Attorney
   223 East 4th Street, Suite 11
   Port Angeles, WA 98362
   jespinoza@co.clallam.wa.us

2. Charlene Allen
   P.O. Box 2121
   Sequium, WA 98382

Dated this 10th day of May, 2016, at Longview, WA.

Diane C. Hays

HAYS LAW OFFICE

May 10, 2016 - 3:36 PM

Transmittal Letter

Document Uploaded: 6-474875-Supplemental Appellant's Brief.pdf

Case Name: State v. Charlene Allen
Court of Appeals Case Number: 47487-5

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Supplemental Appellant's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Diane C Hays - Email: jahayslaw@comcast.net

A copy of this document has been emailed to the following addresses:

jespinoza@co.clallam.wa.us